Nand Lal vs. Yasin Mohammed

SB Civil 1st Appeal No.115/1987

Date of Judgment: 26th February, 2007.

PRESENT

HON'BLE MR.JUSTICE BHAGWATI PRASAD

Mr.Dalpat Raj Bhandari for the appellant/s.
Mr.Mahendra Trivedi for the respondent/s.

Heard learned counsel for the parties.

This is an appeal by Nand Lal – plaintiff arising out of Judgment and decree passed y the learned District Judge, Banswara, dated 30.06.1987.

The plaintiff has filed suit dated 11.12.1973 for recovery of Rs.14,615.60 paise. There was open mutual account between the parties.

The defendant purchased between 31.10.1970 and 20.02.1971 cotton nuts, ground nuts etc. of Rs.61,329.85. Rs.50, 808.60 paise was deposited between 31.10.1970 to 27.04.1971 and

Rs.1,050.97 paise remained due. It is pleaded that Rs.1,050.97 paise and Rs. 9,470.28 paise of dated 27.02.1971 total being Rs.10, 521.25 paise remained due. Further, plaintiff claimed Rs.3,369.00 against interest as per 12% annum. Further, as defendant did not supply D form 3% Sales Tax being Rs.703.05 has also been charged . Total suit has been filed for recovery of Rs.14,615.00

The defendant Yasin Mohammed filed written statement on 05.04.1974. It is admitted that there was an open mutual account khata between the parties operating since 31.10.1970 but defendant in suit No.9/71 secured a Decree dated 28.01.1974 but it is averred that an appeal is pending before Rajasthan High Court, Jodhpur against this decree. It is further stated in defendant's suit No.9/71 that it was not essential for him to file counter suit. He could file separate suit and there is no bar for it. It is also stated that failure to submit counter suit will not bar separate suit.

On 16.12.1974 seven issues were framed. Since issue No.7 being legal issue it was decided first and held suit No.9/71 against which appeal is preferred being civil first appeal No.37/74 decided on 22.09.1986, the judgment dated 28.01.1974 became final.

The learned counsel for the appellant contended that issue No.7 "Whether suit No.9/71 was decided between the parties being a suit for open, mutual and current account in favour of defendant and plaintiff did not claim disputed amount (suit claim) in defence and present suit is barred in view of principles of resjudicata " had been decided without taking evidence."

Issue involved is not a pure question of law. A plea of a bar under Order 2 Rule 2 CPC can be established only if the defendant files the evidence in the pleadings in the previous suit and thereby proves to court the identity of the action in two suits.

The plaintiff has also filed rejoinder and stated that between the parties open, mutual account has not been closed and disputed claim is still due. It is also stated that defendant filed suit No.9/71 and in that dispute, amount is mentioned but it was not essential for him to file counter claim or suit in that very suit. There is no bar for filing separate suit.

The counsel for appellant further submitted that defendant-respondent has not produced the content of plaint in the earlier suit to show what exactly was the cause of action. No

pleadings have been produced. Further from issue itself it is clear it is not a pure legal issue.

The appellant has relied on 2007AIR SCW, 766 (S.Nazeer Ahmd. vs. State Bank of Mysore) wherein it was held that the production of pleadings is a must to determine the question of resjudicata. Further, learned counsel for the appellant relied on 1964 SC 1810 (Gurubux Singh vs. Bhanwarlal). In that it is held that Order 2 Rule 2 CPC can be established only if defendants files pleadings of earlier suit and proves it.

In this case no evidence was taken. From reading of issue it is seen that it is an issue where pure question of law arose. It was required to be seen what was the case in earlier suit, what issues were struck or decided. The matter requires reconsideration as the same was decided without trial.

The appeal is allowed. The impugned judgment and decree is set aside. The matter is sent back. The suit shall be decided afresh on merits.

(BHAGWATI PRASAD), J.